Imagineering International Incorporated v. Microsoft Corp Doc. 1

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

IMAGINEERING INTERNATIONAL,
INCORPORATED,

Plaintiff,

v. Case No. 09-C-0063

MICROSOFT CORPORATION,

Defendant.

NOTICE OF REMOVAL

PLEASE TAKE NOTICE that defendant Microsoft Corporation, by its attorneys Quarles & Brady LLP, hereby removes this case to the United States District Court for the Eastern District of Wisconsin, Milwaukee Division. The grounds for removal are as follows:

I. Procedural Statement

1. Plaintiff Imagineering International, Incorporated ("Plaintiff") commenced a civil action, *Imagineering International Incorporated v. Microsoft Corporation*, Case No. 08-CV-961, in the Circuit Court, Fond du Lac County, Wisconsin on December 11, 2008 ("State Court Action").

2. On December 15, 2008, defendant Microsoft Corporation ("Microsoft") was served with a Summons and Complaint for the State Court action.

3. Defendants have attached to this Notice as Exhibit 1 a true and correct copy of the Summons and Complaint for the State Court Action. A stamp indicating the date and time of

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service is present on the last page of the Complaint. Defendant has received no other process, order, or pleading.

4. To Defendant's knowledge, no proceedings have occurred in the Fond du Lac Circuit Court other than the filing of the Complaint. Defendant has not otherwise responded to the Complaint.

5. Venue lies in the Eastern District of Wisconsin pursuant to 28 U.S.C. § 1441(a), because that District includes Fond du Lac County, Wisconsin. Venue further lies in the Milwaukee Division of the Eastern District of Wisconsin pursuant to Paragraph 1 of the General Order Regarding Assignment of Cases to the United States District Judge Designated to Hold Court in Green Bay, Wisconsin – As Amended Effective January 1, 2005.

6. Thirty days have not expired from the date Defendant received service of the Summons and Complaint in the State Court Action.

7. Defendants are filing a copy of this Notice of Removal with the clerk of the Fond du Lac County Circuit Court and serving a copy on Plaintiff, as required by 28 U.S.C. § 1446(d).

II. Original Jurisdiction Based on Federal Question Jurisdiction

8. This Court has original jurisdiction over the subject matter of the State Court Action under 28 U.S.C. § 1331, as the Complaint presents a federal question.

9. In particular, in Count II of the Complaint, Plaintiff alleges a claim under 5 U.S.C. § 2301, *et seq.*, the Magnuson-Moss Warranty Federal Trade Commission Improvement Act ("Magnuson-Moss Act"). Complaint ¶¶ 23-26. Such a claim is subject to removal if the amount in controversy exceeds $50,000. *Gentek Bldg Products, Inc. v. Steel Peel Litigation Trust*, 491 F.3d 320, 328 -329 (6th Cir. 2007).

10. In Count II, Plaintiff alleges damages exceeding $50,000 because the violation complained of concerns Defendant's alleged failure to replace software "or refund[] the plaintiff's purchase price." Complaint ¶ 25. The alleged purchase price, as set forth in Paragraph 13, *infra*, exceeds $50,000.

III. Original Jurisdiction Based on Diversity Jurisdiction

11. This Court, in the alternative, has original jurisdiction over the subject matter of the State Court action under 28 U.S.C. § 1332, as the citizenship of the parties is diverse and the amount in controversy exceeds $75,000.

12. Plaintiff is a Wisconsin corporation; Defendant is a Washington corporation. As such, the requirements of 28 U.S.C. § 1332(a)(1) are met.

13. As to the amount in controversy, Plaintiff apparently attempts to avoid federal jurisdiction by alleging in certain instances that its damages are less than $75,000. For example, in Count I (breach of contract), Plaintiff alleges that it seeks the "replacement" of certain software "and/or refund" of an alleged purchase price of $70,776, and that its damages on this count do not exceed $75,000. Complaint ¶ 7 (alleging purchase price), ¶ 17 (alleging breach because Defendant allegedly did not replace or refund alleged purchase price), ¶ 18 (alleging that damages do not exceed $75,000). Plaintiff also states in its general claim for relief that it seeks "Actual, consequential and incidental damages, in an amount known to be less than $75,000.00." Complaint at p. 5.

14. Plaintiff, however, also seeks "exemplary damages" and attorneys' fees as part of its general claim for relief. Complaint at p. 5. Plaintiff has alleged a misrepresentation claim; under Wisconsin law, punitive damages and attorneys' fees may be awarded if a party makes a

successful misrepresentation claim. *Cadek v. Great Lakes Dragaway*, 58 F.3d 1209, 1211-1212 (7th Cir. 1995).

15. The Seventh Circuit has held that, unless it can be stated "beyond a legal certainty" that the plaintiff under no circumstances could recover the jurisdictional amount, the federal court should retain jurisdiction over such a claim:

> "Where both actual and punitive damages are recoverable under a complaint each must be considered to the extent claimed in determining the jurisdictional amount." Where punitive damages are required to satisfy the jurisdictional amount in a diversity case, a two-part inquiry is necessary. The first question is whether punitive damages are recoverable as a matter of state law. If the answer is yes, the court has subject matter jurisdiction unless it is clear "beyond a legal certainty that the plaintiff would under no circumstances be entitled to recover the jurisdictional amount."
>
> Applying this analysis to the present case, the answer to the first question is that under Wisconsin law, punitive damages may be awarded for fraudulent misrepresentation. Therefore, the district court had jurisdiction unless it could determine to a legal certainty that a verdict awarding Cadek $5000.01 (the amount necessary to exceed $50,000) in punitive damages "would be excessive and set aside for that reason." The district court erred in so determining."

Id. (citations omitted).

16. Here, under Plaintiff's theory of the case, it may be entitled to $70,776.00 without the award of punitive damages or attorneys' fees. While Microsoft absolutely denies any liability in this matter, it cannot be said beyond a legal certainty that Plaintiff in no circumstance could be awarded damages exceeding $75,000.

WHEREFORE, Defendant requests that the State Court Action be removed from the Fond du Lac Circuit Court and into this Court.

Dated this 14th day of January, 2009.

CRISTINA HERNANDEZ-MALABY
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